No. 74-1233

Supreme Court, U. S.
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OCTOBER TERM, 1974

CLIFFORD T. GREEN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner Suarez, a physician registered under the Controlled Substances Act, contends that as a registrant he is immune from prosecution under the principal felony provision of the Act, 21 U.S.C. 841(a)(1); petitioner Green, a licensed pharmacist, contends that pharmacists are exempt from the reach of the same section when they dispense drugs pursuant to facially valid prescriptions; petitioner Fort challenges the sufficiency of the evidence to support his conspiracy conviction; each of the petitioners contends that 21 C.F.R. 306.04(a), which they were also charged with violating, impermissibly expands the scope of conduct proscribed by 21 U.S.C. 841(a)(1).

Petitioners Suarez and Green were charged in the United States District Court for the Northern District of Illinois with multiple counts of dispensing or distributing controlled substances outside the course of their professional prac-

tice, in violation of 21 U.S.C. 841(a)(1) and 21 C.F.R. 306.04(a);[1] each of the petitioners was charged with conspiracy to violate 21 U.S.C. 841(a)(1) and 21 C.F.R. 306.04(a), contrary to 21 U.S.C. 846. A jury convicted petitioner Suarez of conspiracy and of 17 substantive counts, petitioner Green of conspiracy and 10 substantive counts, and petitioner Fort of conspiracy. Suarez was sentenced to five years' imprisonment, Green to three years and Fort to one year. In addition, all were given special parole terms of two years. The court of appeals affirmed (Pet. App. 1-25).

The evidence at trial established that petitioners, working from a medical clinic and pharmacy located across the hall from one another on the eighth floor of a building owned by petitioner Fort, systematically distributed controlled substances for profit and without any medical justification. Petitioners Fort and Green were co-owners of the pharmacy. According to the testimony of government witnesses, "patients" would come to the clinic, receive minimal, if any, medical treatment,[2] and would be given upon request one or more prescriptions either in their own or in a fictitious name for various schedule II

[1]21 U.S.C. 841(a)(1) provides in pertinent part:

> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to * * * distribute, or dispense * * * a controlled substance * * *.

21 C.F.R. 306.04(a) (now 21 C.F.R. 1306.04(a) (1974 ed.)) provides in pertinent part:

> A prescription for a controlled substance * * * must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice. * * *

[2]Petitioner Suarez conducted no genuine physical examinations (Tr. 750, 812, 924, 988, 1136-1137). Indeed, Jackie Hunter, who worked in the clinic as receptionist and office manager for well over a year, testified that except on one or two occasions she never saw Suarez give a patient an examination of any sort (Tr. 434).

and III controlled substances.[3] They were then routed to the pharmacy across the hall,[4] where petitioner Green filled their prescriptions without inquiry. While the clinic had a "15 day rule," which prohibited revisits more than once every fifteen days, there were also "preferred patients" who came as often as they wished and were permitted to purchase multiple prescriptions for the same drug (Tr. 452-464, 506-514).[5] These "preferred patients" were the primary recipients of the prescriptions issued in fictitious names—names that included "Lana Turner," "Mark Twain," "Ralph Nader" and the like (Govt. Group Exh. 425). Petitioner Green filled these prescriptions as a matter of course. On one occasion, however, he was overheard cautioning Suarez about giving too many prescriptions to a man whom Suarez had previously suspected of being an undercover agent (Tr. 517-518).

Because of petitioner Green's complaint that a pharmacy across the street was filling some of the prescriptions written by petitioner Suarez, a private telephone line was eventually installed linking the clinic with Green's pharmacy (Tr. 528-529). Green had suggested that Suarez telephone in the prescriptions, thus forcing patients to come to his pharmacy, and that at the end of the day Suarez

[3]These included ritalin, desbutal, doriden and tuinal.

[4]Several witnesses described the circular pattern that "patients" would follow—entering the clinic by the front entrance and leaving by the back door, where they were then directly opposite the front door of the pharmacy (*e.g.*, Tr. 426-430, 750-751, 3551-3553).

[5]One "preferred patient," Lorenzo Bliss, would occasionally call the clinic in advance and say, for example, that he was bringing 20 "children" with him; that meant that he wanted 20 groups of prescriptions (a "group" or "set" would include a prescription for an "upper" such as ritalin and for a "downer" such as doriden) for which he paid $10 a set or a total of $200 (Tr. 499). Non-preferred patients were charged $10 a visit (Pet. App. 5).

could simply transfer the written prescriptions. Petitioner Fort later expressed disappointment that Suarez was not making greater use of this private line (Tr. 530).

Fort, besides owning the building and a one-half interest in the pharmacy, was involved in the administration of the pharmacy (Tr. 2010-2012) and also appeared frequently in the clinic. He was aware of the "15-day rule" and its exceptions; one "preferred patient," Lorenzo Bliss (see n. 5, *supra*), frequently entered the pharmacy carrying a brief case and went into the back room to talk with Green and Fort (Tr. 1276). Fort had posted a security guard in the building to prevent the resale of medication and to ensure that no one entered the pharmacy without a prescription (Tr. 3546-3548).[6] Like petitioner Green, Fort at one point became apprehensive about Suarez' methods: When one of the pharmacy employees, noting the large numbers of people waiting their turn in the hallway outside the clinic, commented that it was not possible for them all to have the same illness and to be receiving the same medication, Fort replied that Suarez was "getting out of hand" (Tr. 1281-1282).

1. Petitioner Suarez' contention that, as a physician registered under the Controlled Substances Act, he is immune from prosecution under 21 U.S.C. 841(a)(1) is presently before this Court in *United States* v. *Moore*, No. 74-759, certiorari granted, February 18, 1975. Accordingly, we suggest that the petition in the instant case be held pending a decision in *Moore*.[7]

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[6]The efforts to prevent resale of medication were apparently limited to the lobby of the building; upstairs in the reception room of the clinic individuals freely purchased, sold and traded prescriptions (Tr. 757-759).

[7]We are sending a copy of our brief in *Moore* to petitioner's counsel.

2. Petitioner Green contends (Pet. 8) that "*Moore* is not directly applicable to pharmacists" and therefore that the decision in that case will not be dispositive of his case. He notes that the Controlled Substances Act distinguishes both definitionally and for purposes of registration between a "pharmacy" and a "pharmacist." Thus, Section 802(20) includes a "pharmacy" but not a "pharmacist" within the definition of a "practitioner" (that is, one authorized under the Act to "dispense * * * a controlled substance in the course of professional practice * * *"). Section 822(c)(1) in turn exempts the individual pharmacist—as distinct from a pharmacy—from the requirement of registration under the Act[8] and authorizes his possession of controlled substances if he "is acting in the usual course of his business or employment." Petitioner Green argues upon this basis that—even assuming registrant-practitioners are authorized to dispense only "in the course of professional practice" and may be prosecuted when they dispense for non-medical purposes—he is neither a registrant nor a practitioner, and his authorization is not limited by the same standard; rather, his conduct is "in the usual course of his business or employment," and is thus lawful, if he dispenses pursuant to prescriptions that are valid on their face.

Nothing in the Controlled Substances Act or its legislative history suggests that the purpose for which a pharmacist dispenses medication is any less relevant to the scope of his exemption from prosecution under Section 841 than the purpose for which a physician dispenses

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[8]21 C.F.R. 1301.24 (1974 ed.) confirms that "a pharmacist employed by a pharmacy need not be registered individually to fill a prescription for controlled substances if a pharmacy is so registered."

is relevant to his authorization.[9] The "usual course" of a pharmacist's business or employment is the dispensing of drugs "in the course of professional practice," not the indiscriminate filling of prescriptions "valid on their face" with knowledge that they were issued for non-medical purposes. In the instant case, the evidence was overwhelming that Green knew of and subscribed to the illicit purpose for which Suarez was issuing prescriptions. Thus, if Suarez became liable under Section 841 when he dispensed outside the course of professional practice—the issue controlled by *Moore*—then Green is similarly liable. Accordingly, disposition of this contention should be deferred pending a decision in *Moore*.

3. Petitioners' contention that 21 C.F.R. 306.04(a), which they were also charged with violating, invalidly expands the range of activities proscribed by 21 U.S.C. 841(a)(1) is without substance. They contend that while "the statutory language ['in the course of professional practice,' 21 U.S.C. 802(20)] only requires that the doctor be acting as a doctor in dispensing the prescriptions, the regulatory language ['for a legitimate medical purpose'] requires that the prescriptions be for drugs which are accepted

[9]The legislative history suggests that the distinction by Congress between "pharmacy" and "pharmacist" was primarily a concession to the retail drug industry stemming from administrative considerations. A chain drug store spokesman, for example, had told the Senate Judiciary Committee that "[i]f, under the proposed legislation, each pharmacist were required to register to dispense * * * drugs, chaos could result in [drug stores with two or three pharmacists]. * * * [T]hree individuals[']registry numbers would appear on invoices as they came in, and on prescriptions as they were dispensed. The objective of greater inventory control would be jeopardized by a mounting log of transfers and inventory changes." Hearings on S. 1895 before a Subcommittee of the Senate Committee on the Judiciary, 91st Cong., 1st Sess. 552 (1969).

medically for treatment of the particular ailment" (Pet. 9). The evidence at trial established conclusively, however, that Suarez was not prescribing drugs "in the course of [his] professional practice"—indeed, it showed that he was not acting as a medical doctor at all but as a drug pusher. Suarez' activities in this regard were carried on with knowledge by and the active participation of petitioners Green and Fort. Thus, any arguable expansion[10] of the statutory standard effected by the regulation had no relevance to petitioners. As the court of appeals concluded (Pet. App. 17-18):

> Although it is probably true that more precise regulations are desirable as to what physicians may or may not do with respect to the exception clause of section 841(a), the present cases are not of the border line variety which had in part motivated Congress to abandon the Harrison Act and enact the Controlled Substances Act. In the present cases there were wholesale sales of prescriptions without even the pretense of a legitimate medical purpose or standard medical procedures. Under these circumstances we find no merit in the defendant's claims that the regulation expanded what was criminal beyond the congressional statute.

[10]Faced with a similar contention that the phrases "for any legitimate medical research purposes" and "in the usual couse of professional practice" have different meanings, the Ninth Circuit has said: "The two phrases * * * have essentially the same meaning. * * * The [statutory] language clearly means that a doctor is not exempt from the statute when he takes actions that he does not in good faith believe are for legitimate medical purposes." *United States* v. *Rosenberg*, C.A. 9, No. 74-2197, decided March 31, 1975, petition for a writ of certiorari pending, No. 74-1367 (slip op. 10-11). Moreover, as the *Rosenberg* court pointed out (slip op. at 11, n. 11), prior cases of this Court involving the liability of physicians and druggists under the Harrison Narcotics Act uniformly defined the statutory phrase ("in the course of professional practice only") as meaning prescribing or dispensing for a bona fide medical purpose. See, *e.g.*, *Linder* v. *United States*, 268 U.S. 5, 18.

4. Petitioner Fort's claim that the evidence did not support his conspiracy conviction was correctly rejected by the court of appeals as follows (Pet. App. 18):

> While the evidence against Fort is not overwhelming, there was sufficient testimony tying him to the prescription sales operation. He was fully aware of the 15 day rule and its operation. He knew that there were exceptions to the rule and that one of these exceptions was Lorenzo Bliss, whom Fort knew personally. Furthermore, Fort not only knew of the direct telephone link-up between the medical clinic and pharmacy, but he expressed disappointment that Dr. Suarez was not making greater use of the line in order that clinic patients would be forced to come to Fort's pharmacy. In addition, Helen Basie testifed that to her comment that there were too many people in the clinic and that it could not be possible for that many people to be coming to see this doctor with the same illness and getting the same medication, Fort replied, "Yes, he's getting out of hand."

The court went on to note Fort's role in hiring a security guard to ensure that patients did not sell their medication in the building. He was also actively involved in ordering and picking up supplies for the pharmacy, which included the purchase of more than 1,000,000 ritalin tablets alone in an eleven-month period. The court concluded (Pet. App. 19):

> From all this evidence the jury could reasonably conclude that Fort was not a passive part-owner of a pharmacy involved in illegal distribution of controlled substances, but that he knew of and was involved in a concerted effort to violate section 841(a).

The petition for a writ of certiorari should be held pending this Court's decision in *United States* v. *Moore*, and then disposed of in accordance with that decision.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.